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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SERGIO MELGAR, Plaintiff and Appellant, v. STATE OF KENTUCKY, et. al., Defendant and Respondent.	B264723 (Los Angeles County Super. Ct. No. BC558735)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard Rico, Judge. Affirmed.

Alireza Alivandivafa for Plaintiff and Appellant.

Seyfarth Shaw, Timothy M. Rusche, Timothy M. Fischer, and Monica A. Rodriguez, for Defendants and Respondents.

Many cases require us to resolve complicated issues to determine who should prevail on appeal from a trial court judgment, but this is not one of them. Defendant and respondent University of Kentucky (defendant) moved to quash plaintiff and appellant Sergio Melgar's (plaintiff's) service of summons for lack of personal jurisdiction. Defendant alternatively moved for dismissal of plaintiff's action under the forum non conveniens doctrine. The trial court entered a judgment of dismissal predicated on both theories. Now on appeal, plaintiff challenges only the trial court's ruling on the motion to quash. We therefore may—and do—affirm the judgment based on plaintiff's failure to contest the court's forum non conveniens ruling. We also explain why the personal jurisdiction ruling was correct in any event.

I. BACKGROUND

A. Plaintiff's Lawsuit

Prior to his employment with defendant, plaintiff was a resident of California and chief financial officer (CFO) at UCLA Health. In April of 2004, plaintiff's friend and former supervisor, Dr. Michael Karpf, who was then working for defendant, called plaintiff from Lexington, Kentucky and asked plaintiff if he would be interested in coming to work as the CFO for UK HealthCare. They negotiated for several months over the telephone and by mail, and plaintiff traveled to Kentucky on one occasion in connection with the job negotiations.

Plaintiff and defendant eventually reached an agreement, which Dr. Karpf sent to plaintiff in California and plaintiff executed and returned by fax. In relevant part, the agreement stated defendant would pay plaintiff a salary commensurate with the salary of others of similar stature in his field. The agreement also provided: "[Plaintiff] will receive a three-year initial contract that will provide for one-year extensions of the three-year term after the first year, contingent on successful performance, thereby preserving the duration of the three-year term." The agreement did not include provisions respecting a choice of forum, choice of law, or consent to jurisdiction if a dispute were to arise.

Plaintiff commuted from his home in California to Kentucky during the first few months of his work under the agreement. After this short initial period, plaintiff moved with his family to Kentucky, where he continued to work and live for eight years until defendant terminated his employment in 2012. After that, plaintiff worked for a time in Chile, and he eventually relocated to Massachusetts where he became Executive Vice President and CFO at the University of Massachusetts Memorial Medical Center. Although plaintiff and his family lived in Massachusetts at the time of the trial court proceedings, he also continued to maintain a home in Kentucky.

Two years after defendant terminated him, in September 2014, plaintiff filed a complaint against defendant alleging defendant induced him to move to Kentucky by making false promises of certain employment benefits. In particular, plaintiff alleged that his agreement with defendant required three years' notice before he could be terminated, and that defendant failed to give such notice. His complaint asserted two causes of action: one alleging a violation of Labor Code section 970 et seq. (influencing a person to change employment by false pretenses) and the other a violation of California's Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.).

B. Defendant Seeks Dismissal of the Lawsuit on Personal Jurisdiction and Forum Non Conveniens Grounds

Defendant appeared specially and moved to quash service of the summons for lack of personal jurisdiction (Code Civ. Proc., § 418.10, subd. (a)(1)). Defendant also moved, in the alternative, for dismissal on the theory that California was an inconvenient forum (Code Civ. Proc., § 418.10, subd. (a)(2)). Defendant's moving papers argued California lacked personal jurisdiction because defendant had no offices, employees, or any place of business in California; did not advertise in an effort to recruit employees who resided in California; and did not otherwise do business in California or recruit any other employees (besides plaintiff) who were former residents of California. A declaration from Dr. Karpf submitted with the moving papers averred all witnesses with any knowledge relevant to

the claims in plaintiff's lawsuit, and all university files related to plaintiff's hiring and employment, were located in Kentucky.

In opposition, plaintiff argued the court did have personal jurisdiction over defendant. Plaintiff did not oppose defendant's request for dismissal because California was an inconvenient forum.

C. The Trial Court's Ruling

The trial court concluded it lacked personal jurisdiction over defendant. It found "[d]efendant's contacts with the state fall nowhere near substantial enough" to establish defendant was "at home" in California and thus subject to the state's general jurisdiction. The court further found that recruitment of an employee, as presented by the facts in this case, was not a sufficient ground for specific jurisdiction. The court concluded "the cause of action in this complaint occurred outside of California eight years into Plaintiff's employment with Defendant meaning that even if Defendant had contacts with California, this matter has likely not [a]risen out of them." The trial court further found that asserting jurisdiction over the action would "violate notions of fair play and justice as virtually every aspect of this case in located in Kentucky."

In addition, the trial court ruled the lawsuit should be dismissed on the alternate ground of forum non conveniens, finding that the state of Kentucky was a more convenient forum. Based on the evidence submitted by the parties, the court concluded "virtually every aspect of this matter is situated in Kentucky. All proof, witnesses, and interests in the matter would be located in Kentucky." Indeed, the trial court observed that "[t]he one element of this case that is not located in Kentucky is Plaintiff" and he resided not in California but in Massachusetts.

II. DISCUSSION

As we have explained, plaintiff's appeal addresses only the trial court's ruling granting the motion to quash for lack of jurisdiction and not the trial court's grant of defendant's forum non conveniens motion—an independent basis sufficient to sustain the

judgment of dismissal. We briefly explain why the trial court's jurisdictional ruling was correct, and we affirm both on that basis and because plaintiff fails to challenge the independently sufficient ground for the judgment below.

A. Jurisdiction

"Personal jurisdiction may be either general or specific." (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 445 (*Vons*).) A nonresident defendant is subject to the forum's general jurisdiction where the defendant's contacts are "'substantial . . . continuous and systematic.'" (*Ibid.*, quoting *Perkins v. Benguet Mining Co.* (1952) 342 U.S. 437, 445, 446.) In that situation, the cause of action need not be connected with the defendant's contacts with the forum state. (*Vons*, *supra*, 14 Cal.4th at p. 445; *Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147.) "Such a defendant's contacts with the forum are so wide-ranging that they take the place of physical presence in the forum as a basis for jurisdiction." (*Vons*, *supra*, 14 Cal.4th at p. 446.)

"If the nonresident defendant does not have substantial and systematic contacts with the forum state, the defendant may be subject to specific jurisdiction if (1) '"'"the defendant has purposefully availed himself or herself of forum benefits"' with respect to the matter in controversy, (2) '"the 'controversy is related to or "arises out of" [the] defendant's contacts with the forum,'"' and (3) the exercise of jurisdiction would comport with fair play and substantial justice. [Citations.]" (*Thomson v. Anderson* (2003) 113 Cal.App.4th 258, 266.)

On review, we apply our independent judgment to the ultimate question of jurisdiction, but to the extent that question turns on factual issues, we defer to the trial court's findings of fact if they are supported by substantial evidence. (*Young v. Daimler AG* (2014) 228 Cal.App.4th 855, 865; *In re Automobile Antitrust Cases I and II* (2005) 135 Cal.App.4th 100, 113-114.) We resolve all conflicts in the relevant evidence against plaintiff and in support of the trial court's ruling. (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 535.)

1. General jurisdiction

The United States Supreme Court recently clarified the principles of general jurisdiction in *Daimler AG v. Bauman* (2014) ___ U.S. ___, [134 S.Ct. 746, 761]. The Court held: "[T]he inquiry . . . is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so "continuous and systematic" as to render [it] essentially at home in the forum State.' [Citation.]" (*Id.* at p. 761.) A company may be subject to general jurisdiction in a state other than its state of incorporation or principal place of business only in an "exceptional case." (*Id*. at p. 761, fn. 19.) The facts to which plaintiff pointed in support of his argument for general jurisdiction essentially amounted to the negotiation of his employment contract while he was in California, his initial work in California for a few months while commuting to Kentucky, and defendant's "engage[ment of] Cupertino-based Apple in providing computer hardware and software to students." As the trial court correctly found, this showing was "wholly inadequate at establishing the level of contacts necessary." (See *Helicopteros Nacionales de Colombia v. Hall* (1984) 466 U.S. 408, 416; *Young v. Daimler AG*, *supra*, 228 Cal.App.4th at p. 866.)

2. Specific jurisdiction

Plaintiff does not make a sufficient showing to establish specific jurisdiction. As to each of the three elements we consider when determining whether specific jurisdiction exists—purposeful availment, nexus between the controversy and the defendant's contacts with the forum, and whether exercising jurisdiction comports with fair play and substantial justice—plaintiff falls short of the mark.

"'The purposeful availment inquiry . . . focuses on the defendant's intentionality. [Citation.] This prong is only satisfied when the defendant purposefully and voluntarily directs [its] activities toward the forum so that [it] should expect, by virtue of the benefit [it] receives, to be subject to the court's jurisdiction based on' [its] contacts with the forum." (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269, quoting *U.S. v. Swiss*

American Bank, Ltd. (1st Cir. 2001) 274 F.3d 610, 623-624.) We see insufficient evidence of purposeful availment here. Indeed, the circumstances here are in many respects similar to those in *Stone v. State of Texas* (1999) 76 Cal.App.4th 1043, where the court held the evidence did not establish the university defendant purposely availed itself of the forum state. (*Id.* at pp. 1048-1049 [no purposeful availment shown by virtue of University of Texas Health Center's recruitment of the plaintiff from California; place of contracting is not dispositive, and foreign corporation does not subject itself to jurisdiction in California simply by employing a California resident to perform services outside California].)

To satisfy the relatedness requirement, a plaintiff must show "'a substantial nexus or connection between the defendant's forum activities and the plaintiff's claim.' [Citation.]." (*Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1068 (*Snowney*).) Here, plaintiff's claims against defendant primarily arise out of conduct that occurred in Kentucky eight years after the negotiations that led to plaintiff's employment with defendant. The trial court thus correctly reasoned that even if defendant did have some significant contacts with California, the dispute between plaintiff and defendant "has likely not [a]risen out of them."

Plaintiff's argument for special jurisdiction falters most noticeably on the question of whether California's exercise of jurisdiction would comport with traditional notions of fair play and substantial justice. (See generally *Asahi Metal Indus. Co., Ltd. v. Superior Court of California, Solano County* (1987) 480 U.S. 102, 114 (*Asahi*).) When assessing whether jurisdiction would be fair, a reviewing court considers the burden a defendant would face if forced to litigate in the forum state, the forum state's interest in adjudicating the claim, the plaintiff's interest in obtaining convenient and effective relief in the forum, judicial efficiency considerations, and the shared interest of the several States in furthering fundamental substantive social policies. (*Snowney, supra,* 35 Cal.4th at p. 1070; accord, *Asahi, supra,* 480 U.S. at pp. 113-114.) Here, it would indeed offend traditional notions of fair play by burdening defendant with the cost of litigating a case in a forum some 2,000 miles away from its place of business where plaintiff is not a

California resident, essentially all of the evidence is located in Kentucky, the nonresident plaintiff owns a house in Kentucky, and there is no dispute that Kentucky is a suitable forum in which he could pursue relief. (*Stone*, *supra*, 76 Cal.App.4th at p. 1050.)

B. Forum Non Conveniens

The judgment of a lower court is presumed correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Because we presume judgments are correct, an appellant bears the burden to affirmatively show error warranting reversal. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 ["'A judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown'"].) Even where our standard of review is de novo, failure to address an issue constitutes abandonment. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1177 [affirming summary judgment with respect to certain claims where appellant's briefs failed to challenge the independent grounds supporting the trial court's grant of summary adjudication on such claims]; see also *Proctor v. Vishay Intertechnology, Inc.* (2013) 213 Cal.App.4th 1258, 1272 [affirming demurrer ruling where the plaintiffs pointed to no error in application of collateral estoppel].)

Without opposition from plaintiff, the trial court granted defendant's motion to dismiss the lawsuit because California is an inconvenient forum. This is an independent basis on which the judgment below rests.

Plaintiff's opening brief does not argue the trial court's forum non conveniens ruling was incorrect. Defendant's brief highlighted plaintiff's failure to address the ruling and cited authority establishing the failure is a waiver that alone warrants affirmance. Plaintiff did not address that argument in reply; indeed, he did not file a reply brief. Having failed to establish—or more precisely, make an effort to establish—the trial court's ruling on the inconvenient forum motion was erroneous, affirmance of

the judgment is warranted even if plaintiff's jurisdictional arguments were correct.[1] (*People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1237 [affirming based on the defendant's failure to address on appeal independent bases justifying trial court's ruling].)

DISPOSITION

The judgment is affirmed. Defendant is to recover its costs on appeal.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

RAPHAEL, J.[*]

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[1] For the reasons we have already summarized in connection with our discussion of the fair play and substantial justice element of specific jurisdiction, we would conclude the trial court's forum non conveniens ruling is correct even if we were to reach the issue on the merits.

[*] Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.